SUPREME COURT, U.S.
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No. 1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Southern Railway Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia (R. 142) is not officially reported. It is printed at page 1a, *infra*. The opinion of the Court of Appeals for the Fifth Circuit (R. 159) is reported at 364 F. 2d 86, and is printed at page 12a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (R. 181; p. 29a, *infra*) was entered on July 27, 1966. A timely-filed petition for rehearing en banc was denied by that Court on September 22, 1966. (R. 244; p. 30a, *infra*) On December 4, 1966, Mr. Justice Black extended the time for filing this petition to and including February 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under a section of the Interstate Commerce Act which authorizes the Interstate Commerce Commission to issue, without notice and hearing, car service "directions" to deal with an "emergency", the Commission may lawfully, without notice and hearing, establish general car service regulations of nationwide application to deal with a chronic problem, when another section of the Act provides that the Commission may establish "rules, regulations, and practices" relating to car service only "after hearing".

2. Whether a defendant in an action brought by the United States to recover penalties for alleged violations of a car service order issued by the Interstate Commerce Commission without notice and hearing is precluded from challenging the validity of the order.

STATUTES INVOLVED

Sections 1(14)(a) and 1(15) of the Interstate Commerce Act provide as follows:

Section 1(14)(a), 49 U.S.C. 1(14)(a):

"Establishment by Commission of rules, etc., as to car service.

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices."

Section 1(15), 49 U.S.C. 1(15):

"Powers of Commission in case of emergency.

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to

the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

STATEMENT

On May 31, 1963, a 15-count civil penalty action was brought by the United States against petitioner Southern Railway Company charging violations of Second Revised Service Order 939, relating to freight car service, issued by the Interstate Commerce Commission. The complaint, filed in the United States District Court for the Middle District of Georgia, sought the statutory maximum of $500 on each of the 15 counts. (R. 1-24)

Differing factual situations were involved in the various counts. Generally, however, the first 10 counts (R. 2-17) alleged failures to observe the requirement of Subparagraph (b)(3) of the Service Order (R. 128) that:

> "Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner."

Counts 11 through 15 (R. 17-24) alleged that Southern had disobeyed Subparagraph (b)(4) of Service Order 939 (R. 128) which stated that:

> "Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner."

After the filing of petitioner's answer (R. 30-40) respondent moved for summary judgment as to 13 of the 15 counts of the complaint (R. 41) and petitioner filed a cross-motion with respect to all counts (R. 101). One of the grounds of petitioner's motion was that the Service Order which it was charged with violating was void and invalid because Section 1(15) of the Interstate Commerce Act, upon which the Commission had relied in promulgating it without notice and hearing, in fact provided no authority for its promulgation. This argument was predicated essentially on the proposition that Section 1(15) does not permit the Commission to disregard the normal requirements of notice and hearing in issuing broad rules and regulations, like Service Order 939, of general applicability and designed to deal with a chronic problem such as what the Commission has characterized as a long-standing nationwide car shortage, but rather is addressed only to the issuance of particularized car-service "directions" in emergency situations. Petitioner urged that this was clear

not only from the language of Section 1(15), but by reason of the fact that the immediately preceding Section of the Interstate Commerce Act (§ 1(14)) expressly deals with the Commission's authority to establish "*after hearing* * * * reasonable rules, regulations and practices with respect to car service." (Emphasis added.)

Petitioner's argument was made in the context of the following factual background:

Since the end of World War II the railroad industry in the United States has, according to the Interstate Commerce Commission, been plagued by a first sporadic and, since around 1950, chronic shortage of freight cars. The existence of this shortage has been consistently and explicitly referred to in numerous official publications of the Interstate Commerce Commission, issued over a period of some 20 years. Thus the Commission's Annual Report for 1947 (I.C.C. 61st Ann. Rep., at p. 128) stated that "The shortage of railroad boxcars and open-top cars is acute." Similar statements were made in succeeding years. See, *e.g.*, I.C.C. 64th Ann. Rep., 1950, at p. 30 ("Since the week ended May 20 a drastic and widespread shortage of cars of all classes has been experienced"); I.C.C. 68th Ann. Rep., 1954, at p. 50 ("The adequacy of the boxcar fleet is of concern to us because, since January 1954, the boxcar ownership has progressively deteriorated while the number of unserviceable boxcars has increased"); I.C.C. 70th Ann. Rep., 1956, at p. 159 ("Freight cars, particularly boxcars, have not been in sufficient supply to meet commercial demands for many years"); I.C.C. 71st Ann. Rep., 1957, at p. 136 ("Shortages of freight cars, particularly boxcars, have reached serious proportions in recent years"); I.C.C. 72d Ann. Rep., 1958, at p. 135 ("At various times during the last 12 years,

the Nation has been faced with a critical shortage of freight cars"); I.C.C. 74th Ann. Rep., 1960, at p. 184 ("The freight-car supply situation has been a serious problem for many years"); I.C.C. 75th Ann. Rep., 1961, at p. 106 ("The decrease in the ownership of plain boxcars caused great concern"); I.C.C. 75th Ann. Rep., 1962, at p. 198 ("The Commission has for a number of years been greatly concerned with the diminishing supply of railroad freight cars and the critical shortages that have occurred during periods of peak loadings"); I.C.C. 77th Ann. Rep., 1963, at p. 17 ("The Nation is faced with one of the most serious boxcar shortages in its history"); I.C.C. 78th Ann. Rep., 1964, at p. 38 ("Car shortages prevailed throughout the year but were accentuated during peak harvest movements of grain and other crops"); I.C.C. 79th Ann. Rep., 1965, at p. 49 ("Car shortages during the fiscal year of 1965 occurred with greater frequency and severity").

As early as 1946 the Interstate Commerce Commission instituted, on its own motion, an investigation and hearing to consider whether to attempt to ameliorate the alleged freight car shortage by exercising its authority under Section 1(14) of the Act to establish, after hearing, car services rules, regulations and practices of general application. The Commission ultimately concluded not to establish any such rules, regulations or practices.[1]

In 1950 the Commission did issue a car service order of general and nationwide application.[2] In promulgating this order, however, the Commission held no hearings as required by Section 1(14) but instead pur-

[1] Car Service, Freight Cars, 268 I.C.C. 687 (1947).

[2] Car Service Order No. 866, issued Sept. 11, 1950, effective Sept. 20, 1950.

ported to act under Section 1(15), which authorizes the issuance of car service "directions" without hearing in cases of "emergency". The order was several times extended and did not expire finally until December 31, 1953. In mid-1955 a similar order was promulgated without hearing, again purportedly pursuant to the Commission's authority to issue emergency directions;[3] shortly after this order expired, at the end of 1955, still another substantially identical order was issued under the same procedures, and remained in effect during most of 1956.[4]

During the remainder of the 1950's and the early 1960's the Commission, as earlier noted, continued to proclaim the existence of a substantially unbroken freight car shortage of serious dimensions. It did not, however, see fit to institute any proceeding under Section 1(14) of the Act looking toward the establishment of rules, regulations and practices to ameliorate those shortages. When in 1962 the Commission finally again took action of general application with respect to the question of car service, it again acted without notice and hearing in issuing Service Order 939, which in its "second revised" version is the order involved in this case.

Service Order No. 939, as originally promulgated and as revised, applied generally to all rail common carriers subject to the Interstate Commerce Act. It applied generally to all plain wide-door 40 foot or longer boxcars and to all 50 foot or longer boxcars. It purported to regulate generally and in all circumstances the use to be made of such boxcars in terms of the desti-

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[3] Car Service Order No. 904, issued July 7, 1955, effective July 25, 1955.

[4] Car Service Order No. 910, issued March 19, 1956, effective April 9, 1956.

nations to and directions in which they might be loaded. The order characterized its own requirements as "rules, regulations, and practices" even though Section 1(15), unlike Section 1(14) which contains a requirement of notice and hearing, does not purport to permit the establishment of "rules, regulations, and practices" but only the making of "directions." In its original form and as amended and revised, the order persisted in effect from May 27, 1962, to November 11, 1963. The incidents charged in this action to constitute violations of the order took place in March and April 1963.

The District Court granted petitioner's motion for summary judgment. Noting that "the Commission's *normal* authority to issue regulations is derived from § 1(14)(a) of the Interstate Commerce Act" and that "the *abnormal* powers, the summary powers, of the Commission are conferred upon it by § 1(15) of the Act," it held that the authority to make emergency directions was not intended as an alternative to the regular rule-making power of the Commission, as the Commission had in effect treated it in Service Order 939.

Respondent appealed to the Court of Appeals for the Fifth Circuit. That court reversed the District Court's judgment. It first held that the District Court had erred in entertaining petitioner's challenge to the validity of Service Order No. 939; that such a challenge may be made only in a proceeding initiated for that purpose before a three-judge court; and that no defendant in a civil penalty action for violation of such an order is entitled to assert such a challenge by way of defense. It held also that the Service Order was in fact a valid exercise of the Commission's emergency authority under Section 1(15) of the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

The decision of the court below betrays a fundamental misunderstanding of important provisions of the Interstate Commerce Act. The effect of the decision has been to deny to petitioner an administrative hearing prior to the promulgation of the order that it is charged with violating, and then to deny it a judicial hearing when that order is sought to be enforced against it. Such a denial of conventionally available procedural rights should not be sanctioned by this Court absent the clearest kind of statutory compulsion. The statutes relevant here, far from providing any such compulsion, on their face militate strongly against the result reached below.

Sections 1(14) and 1(15) of the Interstate Commerce Act were designed by Congress to provide a complementary scheme for exercise of the Interstate Commerce Commission's power over car service. The former section grants to the Commission broad authority to establish rules, regulations and practices after notice and hearing; the latter enables it to issue directions in emergency situations where notice and hearing are impractical.

The Commission's implementation of this important statutory scheme has distorted it out of all recognition. Since 1917, when the two sections were enacted, the Commission has issued almost *one thousand* so-called emergency car service orders under Section 1(15). During the same 50-year period it has issued at most only a handful of Section 1(14) orders, and those orders that dealt essentially with compensation rather

than with car handling aspects of car service.[5] Although many of the orders issued by the Commission without notice or hearing have been true emergency directions of the kind sanctioned by Section 1(15), a substantial and, significantly, ever increasing proportion have been broad and pervasive regulations, general rather than *ad hoc* in their application and directed to chronic problems rather than sudden emergencies.

It can hardly be denied that if the Commission's own pronouncements are taken at face value the problem of a nationwide shortage of freight cars has been a chronic rather than a suddenly emergent one. As pointed out in our Statement, the Commission has proclaimed its existence for more than 15 years. It has thus had every opportunity to hold and complete, long prior to the issuance of Service Order 939, hearings looking to the establishment of reasonable rules, regulations and practices that might have served to ameliorate the claimed shortage. No valid reason appears or has in this case been suggested why the Commission has declined to utilize this opportunity, but has proceeded over this period of more than 15 years by a series of "emergency" orders addressed to a single continuing problem.

By putting its stamp of approval on action by which the Commission has in effect read out of the Interstate Commerce Act one of its provisions, and utilized another provision to accomplish ends for which it was not

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[5] One such order, increasing per diem charges on freight cars to a penalty level, was set aside by a three-judge court on the ground that the Commission was without authority to take this particular action under Section 1(14). Palmer v. United States, 75 F. Supp. 63 (D.D.C. 1947). The *Palmer* case has recently been legislatively overruled. Pub. L. 89-430, May 26, 1966, 80 Stat. 168.

designed, the court below ignored a basic principle of statutory construction frequently articulated in decisions of this Court. It violated the "cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg* v. *Popkin,* 285 U.S. 204, 208. It ignored the stricture that "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." (*Ibid.*) In the instant case, as in *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307, "the statute admits a reasonable construction which gives effect to all of its provisions." Here, as in *Jarecki,* this Court should not permit the Commission or the lower courts to "adopt a strained reading which renders one part a mere redundancy." See also *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555, 560; *United States* v. *Menasche,* 348 U.S. 528, 538-39; *Singer* v. *United States,* 323 U.S. 338, 344.

The legislative history of Section 1(15) confirms what is apparent from the face of the statute. It shows beyond peradventure that the authority to make "just and reasonable directions with respect to car service" without notice, hearing or the making or filing of a report was intended merely to enable the Commission to deal on a short range basis with particularized emergency problems, and that this stop-gap authority was not designed to substitute for considered solutions to continuing problems, arrived at after full and fair hearings. In testimony before the House Committee which was considering the original car service legislation promulgated in 1917, I.C.C. Commissioner Hall, speaking for the Commission, clearly articulated the

appropriate scope of the power to issue emergency car service directions. He stated:

> "But to make clear what I may not have made clear—what is contemplated in a time of emergency is not the substituting of new rules for old. What is contemplated is the giving of specific directions as to specific things, right on the ground, as, for example, Chicago, if the situation is congested there. The Commission, through such agency as it may select for that purpose, says to one carrier 'you take fifty empty cars and deliver them to that road; you take 100 empty cars, and deliver them to that other road.' " (*Hearings Before the House Committee on Interstate and Foreign Commerce* on H.R. 19546, H.R. 20256 and H.R. 20352, 64th Cong. 2d Sess., p. 36 (1917).)

The Commissioner went on to compare the Commission's car service function in an emergency to that of a policeman in a traffic jam. *(Ibid.)*

A proper use of the Commission's Section 1(15) powers is illustrated by Service Orders 2 and 3, issued shortly after enactment of the statute. Those orders directed certain named roads to supply, during a 30-day period, a specified number of empty freight cars each day to certain other named roads to ameliorate shortages of certain equipment in particular areas. This kind of order serves a function truly like that of a policeman in a traffic jam. It stands in vivid contrast to Service Order 939 and its amendments and revisions, which purported to regulate, over a period of some 18 months, the practices of all railroads throughout the country with regard to the loading and routing of boxcars.

Although it has throughout this litigation tenaciously defended the proposition that the Commission's au-

thority under Section 1(15) is broad enough to encompass promulgation of the order at issue, respondent has not candidly faced the implications of this position in terms of its negation of Section 1(14). The Commission and respondent—and the court below—have failed to suggest any function that the latter statute can serve in light of their interpretation of the former. This fact is itself eloquent evidence that that interpretation is improperly expansive. It is time that the proper relationship between Sections 1(14) and 1(15) be authoritatively defined in order to curb the Commission's abuse of the extraordinary summary powers granted it by the latter section. That result can be accomplished only by issuance of the writ in this case.

The Court of Appeals' additional holding, that the validity of a car service order may be tested only in a proceeding initiated for that purpose before a statutory three-judge court invoked pursuant to 28 U.S.C. § 2325, is in direct conflict with the action of this Court in *United States* v. *Koenig Coal Co.*, 270 U.S. 512, and *United States* v. *Michigan Portland Cement Co.*, 270 U.S. 521, both involving a challenge to the validity of car service orders, and is irreconcilable in principle with other decisions of this Court. *Flemming* v. *Nestor*, 363 U.S. 603; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144; *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243.

Koenig Coal and *Michigan Portland Cement* both involved indictments under the Elkins Act. The cement company was charged with receiving and the coal company with giving a preference or priority forbidden by a service order issued by the Interstate Commerce Commission under Section 1(15). In both cases this Court expressly considered, on the merits, challenges to the

validity of the service order raised by the defendants, rather than holding, as the Court of Appeals has here held, that no such challenge will lie outside a three-judge court proceeding. Other cases in which such challenges have been considered in contexts other than a review proceeding before a three-judge court include *Atlantic Coast Line R. Co.* v. *United States,* 140 F. Supp. 569, 571 (Ct. Cl. 1956); *Boston & Maine R. Co.* v. *United States,* 169 F. Supp. 957, 959 (Ct. Cl. 1959); *Western Maryland R. Co.* v. *Commodity Credit Corp.,* 154 F. Supp. 508, 511 (D. Md. 1957); *Reading Co.* v. *Commodity Credit Corp.,* 159 F. Supp. 67, 70 (E.D. Pa. 1958), *rev'd on other grounds,* 289 F. 2d 744 (3d Cir. 1961); and *United States* v. *Thompson,* 58 F. Supp. 213 (E.D. Mo. 1944).

In both *Nestor* and *Mendoza-Martinez* the question presented was whether 28 U.S.C. § 2282, providing that an application for "an interlocutory or permanent injunction restraining the enforcement, operation or execution" of a federal statute must be "heard and determined by a District Court of three judges," precluded challenges to a statute in other forums. In *Nestor* the plaintiff sued in a single-judge district court to attack an order terminating his old age insurance benefits, alleging that the statute pursuant to which the order had been issued was unconstitutional. This Court held that Section 2282 did not prevent this mode of challenge. It pointed out that the action

> "did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis* it would have no other result than to re-

quire the payment of appellee's benefits." 363 U.S. at p. 607.

In *Mendoza-Martinez* this Court held that even an action for a declaratory judgment of unconstitutionality did not require the convening of a three-judge court, observing that

> "The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute." 372 U.S. at p. 155.

The statute relating to review of Interstate Commerce Commission orders by three-judge courts, 28 U.S.C. § 2325, is in pertinent part identical to 28 U.S.C. § 2282.[6] The court below, by giving the former statute an exclusive effect that this Court has specifically denied to the latter, has, we submit, rendered a judgment in conflict not only with *Koenig Coal* and *Michigan Portland Cement* but also with *Nestor* and *Mendoza-Martinez.*

The court below sought to distinguish *Nestor* and *Mendoza-Martinez* by reference to Section 17(9) of the Interstate Commerce Act, construing the words "but not otherwise" in this statutory provision to mean that Interstate Commerce Commission orders may be reviewed in the courts only in the manner set forth there-

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[6] 28 U.S.C. § 2325 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

in, *i.e.*, "under those provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission."[7]

We submit that this interpretation of Section 17(9) is demonstrably erroneous. Nothing in the terms or history of that statute, which became law in 1940, remotely suggests that it was intended to change the principle recognized in *Koenig Coal* and *Michigan Portland Cement* that Commission car service orders may be challenged defensively by carrier defendants. In fact it was designed to serve a quite different function—and one that respondent and the court below have completely misapprehended. That function was simply to require that an application for rehearing addressed to the full Commission must precede "a suit to enforce, enjoin, suspend, or set aside" an order of a Commission division, an individual Commissioner or a board, and thus legislatively to overrule *United States* v. *Abilene & Southern R. Co.*, 265 U.S. 274.[8] Section 17(9) simply

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[7] Section 17(9) provides:

"(9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[8] The *Abilene* case had held that a petition for reconsideration addressed to the Commission was not a condition precedent to "a suit to enforce, enjoin, suspend or set aside an order of a division, Commissioner or board."

does not say what the court below in effect read it as saying, that the validity of Commission orders may be "drawn in question" only in a three-judge court "but not otherwise". Rather by its terms the section relates only to "a suit to enforce, enjoin, suspend, or set aside." See *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243. It is thus totally inapposite here because petitioner's defense of invalidity of Service Order 939, although drawing in question the validity of that order, is not "a suit to enforce, enjoin, suspend, or set aside" the order. Indeed, unlike the situation in *Nestor* and *Mendoza-Martinez* it is not even a "suit." Those cases are thus of *a fortiori* application here.

The fallacy in respondent's reliance in the court below on Section 17(9) is strikingly illustrated by the fact that service orders purportedly invoking the authority of Section 1(15) have with increasing frequency been issued by the full Commission in the first instance.[9] Since Section 17(9) concededly has no application whatever to such orders, as opposed to orders issued by divisions, Commissioners or boards, acceptance of the Court of Appeals' reasoning would require the drawing of a distinction between the right of a carrier to challenge in a civil penalty action the validity of a car service order originally issued by the Commission, on the one hand, and one initially issued by a division, Commissioner or board, on the other. No possible basis in

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[9] See, *e.g.*, Car Service Order No. 975, issued March 16, 1966, effective March 21, 1966; Revised Service Order No. 975, issued March 29, 1966, effective March 30, 1966; Second Revised Service Order No. 975, issued April 14, 1966, effective April 18, 1966; Amendment No. 2 to Second Revised Service Order No. 975, issued December 8, 1966, effective December 31, 1966.

law can be suggested for the drawing of any such distinction.

Section 17(9) thus provides no basis for distinguishing the decision of the court below from those of this Court in *Koenig Coal Co., Michigan Portland Cement, Nestor* and *Mendoza-Martinez,* and the writ should issue to correct the error caused by the Court of Appeals' failure to follow those controlling decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

Memorandum Opinion and Order on Motions for Summary Judgment

(Filed December 22, 1964)

On May 31, 1963 Plaintiff, United States of America, instituted this action against the Defendant, Southern Railway Company, under the provisions of Title 49, U. S. Code, § 1(17). The action seeks to recover penalites for alleged violations of what is denominated "Second Revised Service Order No. 939" originally promulgated by the Interstate Commerce Commission on February 5, 1963.[1] It was de-

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[1] SECOND REVISED SERVICE ORDER No. 939
(VACATES REVISED SERVICE ORDER 939)
UTILIZATION OF FIFTY-FOOT LONG OR LONGER PLAIN BOX CARS AND PLAIN BOX CARS FORTY-FOOT LONG OR LONGER WITH SIDE DOOR OPENINGS EIGHT-FOOT WIDE OR WIDER

At a Session of the Interstate Commerce Commission, Safety and Service Board No. 1, held in Washington, D. C., on the 5th day of February, A. D. 1963.

It appearing, that an acute shortage of box cars fifty-foot long or longer and box cars forty-foot long or longer with side door openings eight-foot wide or more; and it appearing, that the present carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of box cars of these dimensions to the railroads owning such cars are ineffective; the Commission is of the opinion that an emergency exists requiring immediate action in all parts of the country, and that notice and public procedure are impracticable and contrary to the public interest and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ *95.939 UTILIZATION OF FIFTY-FOOT LONG OR LONGER PLAIN BOX CARS AND PLAIN BOX CARS FORTY-FOOT LONG OR LONGER WITH SIDE DOOR OPENINGS EIGHT-FOOT WIDE OR WIDER.*

(a) *Special and general permits—appointment of agent.*

(1) Section (b) of this order shall be subject to any special or general permits issued by the Permit Agent named below.

(2) Charles W. Taylor, Director, Bureau of Safety and Service, Interstate Commerce Commission, Washington 25, D. C., is hereby designated and appointed as Permit Agent of the Interstate Commerce Commission with authority to issue special and general permits to meet exceptional circumstances.

(b) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey all the following rules, regulations, and practices with respect to its car service:

(1) The provisions of this order apply to plain (XM, XME, AND XI) forty-foot or longer box cars with side door openings of eight-foot or wider and plain (XM, XME AND XI) fifty-foot or longer box cars with any size door opening of all ownerships, including all box cars with plug doors.

(2) For purposes of this order, Districts as shown in the Official Railway Equipment Register, ICC R.E.R.-No. 343, supplements thereto or subsequent issues thereof govern. These districts are identified as Association of American Railroads car selection chart showing home districts for all principal freight car ownership.

(3) Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner.

(4) Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner.

(5) Cars locating in other districts (not home districts or districts adjacent thereto) may be used for loading to, via, or in the direction of the owner, or to any destination within a home district or within a district adjacent or intermediate to a home district.

(6) Cars locating empty at a junction with the owner must be loaded to or via the owning road or delivered owner empty at that junction.

(7) In the absence of proper loading, cars must be moved, to the owner empty under Association of American Railroads Car Service Rules or Special Car Order 90.

(c) *Application.* The provisions of this order shall apply to intrastate and interstate commerce.

(d) *Effective date.* This order shall become effective at 12:01 A.M., February 6, 1963.

(e) *Expiration date.* This order shall expire at 11:59 P.M., April 30, 1963, unless otherwise modified, changed, suspended, or annulled by order of this Commission.

cleared in the order that an emergency existed which in the Commission's opinion required immediate action in all parts of the country to alleviate an acute shortage of railway boxcars of specified dimensions.

The complaint contained 15 counts in each of which the Plaintiff sought a judgment (penalty) against the Defendant for $500.00, each count relating to a separate violation of the order and each of the claimed violations relating to dates during the months of March and April, 1963.

The Defendant duly filed its defensive pleadings and thereafter the Plaintiff moved under the provisions of Rule 56 for a partial summary judgment for the relief sought in all but Counts 4 and 8 of the complaint. Subsequently, the Defendant moved for a summary judgment in its favor as to all of the relief sought by the Plaintiff in all counts of the complaint.

This Court is of the opinion that the motion of the Defendant should be granted and the motion of the Plaintiff denied.

While Rule 52(a) of Federal Rules of Civil Procedure provides that findings of fact and conclusions of law are

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Sec. 1, 12, 15, 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15. Interprets or applies Sec. 1 (10-17), 15(4), 40 Stat. 101, as amended 54 Stat. 911; 49 U.S.C. 1 (10-17), 15 (4).

It is further ordered, That this order vacates and supersedes Revised Service Order No. 939 and that a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and filing it with the Director, Office of the Federal Register.

By the Commission, Safety and Service Board No. 1.

HAROLD D. MCCOY,
Secretary.

not necessary on decisions of motions under Rule 56, the Court nevertheless deems it appropriate in this instance to set forth some of the reasons which, in its opinion, require the grant of the motion of the Defendant and the entry of a judgment for the Defendant.

The Court has had the benefit of thorough briefs filed by counsel for both parties and all of the contentions therein expressed and argued have been considered.

One of the contentions made by the Defendant is that this "Service Order" was in fact a Regulation and was void because the necessary hearings were not held by the Commission prior to issuance.

The Commission's *normal* authority to issue regulations is derived from § 1(14)(a) of the Interstate Commerce Act (49 U.S.C. § 1(14)(a)). The *abnormal* powers, the summary powers, of the Commission are conferred upon it by § 1(15) of the Act (49 U.S.C. § 1(15)). These abnormal powers have as their statutory basis the existence of an *emergency*. The authority to make emergency directions was not intended as an alternative to the regular rule-making power of the Commission. Emergency procedures must be confined to actual emergencies. *In Re Solar Mfg. Corp.*, 176 F.2d 493. Even if a real emergency such as contemplated by the statute existed when the car Service Order No. 939 was originally promulgated on May 22, 1962, such could not justify the Commission's continuing to rely on § 1(15) as justification for the varying versions of the order promulgated over a period of eighteen months up until November, 1963.

The underlying statute contemplates a real emergency as justification for the exercise of the extreme and abnormal power delegated by § 1(15) and "a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed". *Chastleton Corporation* v. *Sinclair*, 264 U.S. 543, 547-48.

The record in this case shows that there was no finding of an emergency shortage of 50-foot boxcars or widedoor 40-foot boxcars at the time of the violations alleged in the complaint and there was no emergency within the meaning of § 1(15) when the second revised Service Order was promulgated on February 6, 1963.

Normal procedure requires notice and hearing to protect the rights of all interested parties. Such normal procedure cannot be supplanted by simply denominating continuing regulations as "directions". The limited power of the Commission to make "just and reasonable directions with respect to car service" without notice, hearing or the making or filing of a report is expressly limited to *emergencies*. Were this power not so limited its constitutional validity would be doubtful. Congress sought to avoid that doubt by specifying the limitations.

The record here reveals no emergency justifying the continued use of the abnormal power over the extended period of time involved (May 22, 1962 to November 11, 1963). Service Order No. 939 was originally issued on May 22, 1962 with an expiration date of December 31, 1962. Corrected Service Order 939 was issued May 25, 1962 with the same expiration date. Revised Service Order 939 was issued June 4, 1962 with the same expiration date, but was later amended to expire April 30, 1963. Second Revised Service Order No. 939 was issued February 6, 1963 with an expiration date of April 30, 1963, but was later amended to expire on December 31, 1963, and was vacated and set aside by the Commission on November 11, 1963, this being about six months after the filing of this complaint.

The undisputed facts appearing in this record and the law applicable thereto do not warrant the continuing exercise by the Commission of the abnormal power sought to be delegated to it by § 1(15). Such being the opinion of this Court, the grant of the Defendant's motion for summary judgment is appropriate.

For other reasons the grant of the Defendant's motion for summary judgment is required.

Even if the order had been issued in accordance with proper procedures it is, in my opinion, not legally valid.

Perhaps had notice been given and hearings had prior to the promulgation of the order some of its infirmities would have been detected and corrected. This illustrates the wisdom of the general rule—notice and hearing.

A reading of the order, including, as it does, some uncertain phrases, prompts us to recall the language of Justice Cardozo in *United States of America* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company et al.*, 294 U.S. 499, at pages 510 and 511, where he said:

> "The difficulty is that it (the Commission) has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

This principle is particularly applicable when the United States of America seeks to use an order promulgated without notice or hearing as a basis for the exaction of penalties.

As has been amply demonstrated by the voluminous briefs filed in this case based upon the pleadings and affidavits, the parties to the litigation can and do in good faith argue—pro and con—that this order contravenes the stated purposes of § 1(15) of the Interstate Commerce Act; that even if the validity of the order is assumed under certain circumstances, the Defendant did not violate it; that under the plain meaning of the order it is not applicable to car-

riers; that the facts alleged in the complaint do not constitute violations of the order.

Regardless of the validity of one or the other of these opposing views it is apparent that:

(1) The provisions of the order, being penal in their nature, should be strictly construed in judging the contentions of the Plaintiff.

(2) Service Order No. 939 is so vague, indefinite and uncertain that its enforcement would violate the constitutional rights of the Defendant.

It is clear that the order is penal in its nature. *U. S.* v. *Thompson*, 58 Fed. Supp. 213. By its terms a penalty is provided for each violation when considered in connection with § 1(15) of the statute.

Many precedents decided over a long period of years combined to form the yardstick which measures the order with respect to its vagueness and uncertainty, and the effect of such vagueness and uncertainty in an attempt to recover penalties arising from alleged violations of it.

A statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky,* 234 U.S. 216, 221; *Collins* v. *Kentucky,* 234 U.S. 634, 638." *Connally* v. *General Construction Co.,* 269 U.S. 385-391 (1926).

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U.S. 451, at p. 453.

The Connally and Lanzetta cases, among others, have recently (1961) been cited, approved and applied by the

Supreme Court in invalidating a Florida statute requiring a certain oath of every employee of the State. *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278. Therein (page 287), the Court also cited *U. S.* v. *Cardiff,* 344 U.S. 174, and quoted from it:

> "'Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

To paraphrase other language of the Court in the *Cramp* case (page 287), "the vice of unconstitutional vagueness is further aggravated where, as here, the statute" (regulation) in question, if applied and construed as contended by the Plaintiff, would create a new offense. Almost a century ago (1875) the Supreme Court said:

> "This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction, if it can be avoided." *U. S.* v. *Reese,* 92 U.S. 214, 219.

See also *Connally, supra,* 269 U.S., at page 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."

When the yardstick thus fashioned is applied to this Service Order its deficiencies become readily apparent.

The vice of vagueness clearly appears in a single phrase common to both paragraphs (b)(3) and (b)(4) of this new penal provision. Both provide that certain cars may be "used only for loading" to certain locations. That men of common intelligence may reasonably differ as to the meaning and application of that phrase is apparent. On the one

hand the phrase may be interpreted to mean that the order applies only to shippers, not to carriers (because shippers do the loading), and that even if it does apply to carriers it does not apply to the carrier's act of placing cars for loading or transportation. On the other hand, it not only may be, but is contended that the order applies to carriers and that it applies to their placing cars for loading and transportation.

Such an ambiguity, governing the intended coverage of the order, vitiates it. See in this connection *Bouie* v. *City of Columbia,* 378 U.S. 347, wherein just six months ago (June, 1964) the Court said:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."

And practically contemporaneous with the Bouie case was *Baggett, et al.* v. *Bullitt, et al.,* 377 U.S. 360, in which, following the *Cramp, Connally, Lanzetta* and *Cardiff* cases, *supra,* the Court held that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process.

This Revised Service Order No. 939 which is the basis of the claim for penalties has that same vice.

Finally, we deal with the Plaintiff's contention that "this Court is not the proper forum for an attack on the validity of the Service Order." The Plaintiff chose this court as the forum in which it seeks to recover penalties by reason of alleged violations of the Service Order. In determining whether or not this Court will permit the recovery of such penalties it must necessarily and initially determine the validity of the Service Order if that validity is questioned

as it has been here. Such defenses do not constitute an attack which may be pursued only before a three-judge court in the manner prescribed by 28 U.S.C. § 2321-2325.

> "One of the most-used means of challenging administrative action is by resisting enforcement—by defending proceedings brought to enforce the administrative action." . . .
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> "In general, a defendant in a civil or criminal proceeding brought to enforce an administrative order or regulation may defend on the ground of invalidity of the order or regulation, in absence of affirmative legislative intent to the contrary. The natural assumption is that one may not be held civilly or criminally liable for violating an invalid order or regulation. The tradition is deeply embedded that even statutes may be challenged by resisting enforcement." 3 *Davis Administrative Law*, § 23.07.

See also *Flemming* v. *Nestor*, 363 U. S. 603 and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144.

Furthermore, Revised Service Order No. 939 no longer exists. It has been vacated by the Commission. It is extremely doubtful, therefore, whether one might now proceed under Title 28, § 2325. There is no need to endeavor to resolve that doubt, for here the Defendant does not seek an injunction restraining the enforcement, operation or execution of an order of the Commission. It seeks only to prevent the Plaintiff from collecting certain sums of money from it by asserting that the basis for such attempt, the vacated Service Order, does not permit this Court to compel it to pay such sums of money. It has that right. The situation here differs from that before the Court in *Interstate Commerce Commission* v. *Consolidated Freightways, Inc.*, 41 Fed. Supp. 651, cited by the Plaintiff, and the controlling principle is that ex-

pressed in *Flemming* v. *Nestor, supra and Kennedy* v. *Mendoza-Martinez, supra.*

As indicated, and for the reasons stated, Defendant's motion for summary judgment is granted and judgment will be entered accordingly.

IT IS SO ORDERED this 21st day of December, 1964.

/s/ J. ROBERT ELLIOTT
United States District Judge

This is to certify that I have this day mailed a copy of the within to Bloch, Hall, Groover & Hawkins, P. O. Box 170, Macon, Ga. and two copies to Floyd M. Buford, U. S. Attorney, Macon, Ga. This Dec. 22, 1964.

/s/ JOHN P. COWART
Clerk

Judgment of the Court

(Filed December 29, 1964)

The undersigned having on December 21, 1964, granted defendant's motion for summary judgment and having directed that judgment be entered accordingly, it is therefore Considered, Ordered and Adjudged, that judgment be and is hereby entered for the defendant, which shall also recover all costs of court which may be legally recovered of the plaintiff under applicable statutes.

This 28th day of December, 1964.

/s/ J. ROBERT ELLIOTT
United States District Judge

Presented by:

/s/ CHARLES J. BLOCH
Of counsel for the defendant.

Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22588

UNITED STATES OF AMERICA, *Appellant,*

v.

SOUTHERN RAILWAY COMPANY, *Appellee.*

Appeal from the United States District Court for the Middle District of Georgia.

(July 27, 1966.)

Before TUTTLE, Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

KILKENNY, District Judge: The United States appeals from a summary judgment entered against it in an action against appellee (Southern) under the provisions of 49 U.S.C. § 1 (17). The appellant sought to recover penalties in connection with the appellee's violations of an order promulgated by the Interstate Commerce Commission under the provisions of 49 U.S.C. § 1(15).

After filing of defensive pleadings and certain affidavits, each party moved for a summary judgment. The motion of Southern was allowed. The trial judge held: (1) that the order was procedurally invalid in declaring an emergency; (2) that the order was so vague, indefinite and uncertain as to violate the constitutional rights of Southern; and (3) that Southern was not required to avail itself of the administrative and judicial review procedure provided in the Interstate Commerce Act.

A thorough look into the history of the box car shortage problem is necessary for an intelligent understanding of the legal issues presented, and the reason for

* Of Portland, Oregon, sitting by designation.

the promulgation of the order by the Commission. Long prior to the inception of this litigation, the supply of box cars was acute. The problem was noted in the annual report of the Commission to the Congress for the period November 1, 1954, to October 31, 1955.[1] The concern of the Commission was such that it recommended to the Congress that 49 U.S.C. § 1 (15) be amended to authorize the assessment of a penalty per diem charge as an aid in an emergency or threatened emergency. The Congress failed to act on this recommendation. Again, in 1957, the Commission again recommended legislation on the subject and labeled the report of "fundamental importance."[2] The Congress again failed to act. Similar recommendations to the Congress were repeated for the next four years, all without action. In the meantime, the problem worsened to such an extent that "railroad piracy" commenced, with a number of the lines refusing to return box cars to the owner. The shortage became so acute in March, 1962,[3] that the railroads, by their own Special Car Order No. 103, attempted to solve the problem. For all practical purposes, the order was ignored, and, as a result, railroad shippers and shipper associations appealed to the Commission's Safety and Service Board No. 1, requesting that action be taken in order to obtain an equitable distribution of the car supply and to put an end to "pirating." This group appeal was addressed to the powers of the Com-

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[1] 69th Annual Report of the Interstate Commerce Commission. (United States Government Printing Office, Washington, D.C., 1956, p. 121.)

[2] 71st Annual Report of the Interstate Commerce Commission. (United States Government Printing Office, Washington, D.C., 1957, p. 136.)

[3] 76th Annual Report of the Interstate Commerce Commission. (United States Government Printing Office, Washington, D.C., 1962, p. 104.)

mission under 49 U.S.C. § 1 (14) (a),[4] to those powers granted in 49 U.S.C. § 1 (15)[5] and to 49 U.S.C. § 1 (17) (a),

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[4] 49 U.S.C. § 1 (14) (a).

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

[5] 49 U.S.C. § 1 (15).

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. . . ."

which requires that all rail carriers, and their officers, agents and employees, ". . . to obey strictly and conform promptly . . ." to car service directions or orders made by the Commission, or its designated agent. Penalties are provided of not less than $100.00, nor more than $500.00 for each offense, plus $50.00 for each day the offense continues. These penalties are made recoverable in a civil action.

The Safety and Service Board[6] to which the appeal of the group was directed held a meeting on May 21, 1962, and there decided that the acute shortage of box cars, coupled with the ineffectiveness of the then existent carrier rules and regulations with respect thereto, had resulted in an emergency. An emergency was thereupon declared. The Board, at that meeting, also determined that immediate action was required in all parts of the country and that notice was impracticable. The Board then and there promulgated its Service Order No. 939 to be effective as of May 27, 1962, with an expiration date of December 31st of that year. Essentially, the order, issued by the Board, was nothing more than a restatement of the Special Car Order of the Association of American Railroads, previously mentioned. The order was served on May 27th on the Car Service Division of the Association of American Railroads, as agent for practically all of the nation's lines, including Southern. Notice to the general public was made on May 26, 1962, by publication in the Federal Register.[7]

On June 4, 1962, the Board vacated its Order No. 939 and issued Revised Service Order No. 939 to be effective

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[6] All of the Commission's work, powers, business and functions in connection with car-service matters and all emergency directions pertaining thereto had been assigned to the Safety and Service Board No. 1, 26 F.R. 861, subject, however, to administrative review and supervision by Division 3 of the full Commission. 26 F.R. 862.

[7] 27 F.R. 4965.

June 5, 1962, and to expire on December 31st of the same year. Service was again made on the agent. The revised order was essentially the same as the original. No protest was made by Southern as to the vagueness of either order, or otherwise. For that matter, the vice-president of the appellant on July 5, 1962, directed a letter to the Commission in which appellant seemed to be in full agreement with the requirements of the order and declared its intention to comply therewith.[8] By the fall of 1962, the complaints of acute shortages of double-door 40 foot and 50 foot box cars reached a point where the Chairman of the Commission directed a letter to Southern's president calling attention to the millions of bushels of grain on the ground in Nebraska, the vast amount of milo on the ground in Texas, the soy beans on the ground in Kansas, Missouri, Illinois and Indiana, all because of the box car shortage. Attention was likewise directed to the plight of the lumber industry in the Pacific Northwest. By mid-December, it became evident that the expiration date of the order should be extended to April 30, 1963. The amendment was served on December 18th and notice given on December 22nd.[9] Again, there was no protest from Southern over the extension of the expiration date or otherwise. The problem continued to worsen, so that on February 5, 1963, the Board again met, vacated Revised Order No. 939 and its amendment. It then issued Second Revised Service Order No. 939, which again recited and declared that an emergency existed.[10] The order, here

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[8] The minor corrections in the corrected Service Order of May 25, 1962, published in the Federal Register on June 1, 1962, 27 F.R. 5141, are here of no importance.

[9] 27 F.R. 12718.

[10] "At a Session of the Interstate Commerce Commission, Safety and Service Board No. 1, held in Washington, D.C., on the 5th day of February, A.D. 1963.

"It appearing, That an acute shortage of box cars, fifty-foot long or longer and box cars forty-foot long or longer with side

under attack, declared an effective date as of February 6th and an expiration date as of April 30th, unless otherwise ordered.[11] Service was made on Southern's agent on February 6, 1963. The substance of the order was essentially the same as the previous orders.[12] Southern made no

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door openings eight-foot wide or more; and it appearing, that the present carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange and return of box cars of these dimensions to the railroads owning such cars are ineffective; the Commission is of the opinion that an emergency exists requiring immediate action in all parts of the country, and that notice and public procedure are impracticable and contrary to the public interest and that good cause exists for making this order effective upon less than thirty days' notice."

[11] 28 F.R. 1297.

[12] • • • • •

"(b) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following, rules, regulations, and practices with respect to its car service:

"(1) The provisions of this order apply to plain (XM, XME, and XI) forty-foot or longer box cars with side door openings of eight-foot or wider and plain (XM, XME and XI) fifty-foot or longer box cars with any size door openings of all ownerships, including all box cars with plug doors.

"(2) For purposes of this order, districts as shown in the Official Railway Equipment Register, I.C.C. R.E.R.-No. 343, supplements thereto or subsequent reissues thereof govern. These districts are identified as Association of American Railroads car selection chart showing home districts for all principal freight car ownership.

"(3) Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner.

"(4) Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner.

"(5) Cars locating in other districts (not home districts or districts adjacent thereto) may be used for loading to, via, or in the direction of the owner, or to any destination within a home

objection to this order, nor did it make a claim that the order was in any way vague. On April 12, 1963, this order was amended to extend the expiration date to December 31st. On November 8th of the same year, while this litigation was pending, the Board vacated the order, that amendment becoming effective on November 11th.

Southern, in this case, is charged with 15 violations of the Order between March 30th and April 7th 1963.

I.

The District Judge took the position that even though Southern had failed to exhaust its administrative remedies by asking a review by a three-judge court[13] on the validity of the order, that he had inherent power, even though the attack was collateral in nature, to inquire into the validity of the Service Order under which the penalties were sought. We believe that the judge was in error.

The expertise of the Commission on problems in the industry which it regulates, has long been recognized. *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956); *Chicago R.I. & P. Ry. Co.* v. *United States*, 284 U.S. 80, 95 (1931). The Latin phrase *tractent fabrilia fabri,** is as apt today as when used by the Romans. Already mentioned is the fact that the Congress recognized the experience of the specially trained experts of the

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district or within a district adjacent or intermediate to a home district.

"(6) Cars locating empty at a junction with the owner must be loaded to or via the owning road or delivered owner empty at that junction.

"(7) In the absence of proper loading, cars must be moved, to the owner empty under Association of American Railroads Car Service Rules or Special Car Order 90."

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[13] 28 U.S.C. §§ 2321-2325.

* Let smiths handle smiths' tools.

Commission and granted to them special power in connection with the issuance of railroad car special orders and with reference to declaring an emergency.[14] However, in delegating this power to the Commission, the Congress did not overlook administrative and judicial safeguards, such as the right to petition for a rehearing, reargument or reconsideration by the full Commission if the entire body made the ruling, or by an appropriate appellate body if the ruling was made by a division, an individual commissioner or a board.[15] If a person was dissatisfied with an order of the Commission he could ask an administrative review by the Commission itself,[16] and, if dissatisfied, then seek judicial relief.[17] The requirement of the statute that Administrative and Judicial Review be applicable to all cases of suits to enforce, enjoin, suspend or set aside orders of the Commission, has a direct reference to 28 U.S.C. § 2321, in which the Congress directed that the procedure to be employed in such cases required the creation of a three-judge court. Explicit in the language of the legislation is the requirement that judicial relief, other than for the payment of money or the collection of fines, penalties or forfeitures, must be obtained under

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[14] 49 U.S.C. § 17 (1), (2), (3), (4); 49 U.S.C. § 1 (15).

[15] 49 U.S.C. § 17 (6).

[16] 49 U.S.C. § 16 (6), 49 U.S.C. § 17 (7).

[17] 49 U.S.C. § 17 (9).

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

§§ 2321-2325 of Title 28. A long line of Supreme Court cases establishes the principle that where Congress has provided administrative and judicial review procedures which are designed to permit agency expertise to be brought to bear upon particular problems, the prescribed procedures are exclusive, and this is true even though Congress may not have expressly provided for the exclusiveness of the statutory procedure. *Whitney Bank* v. *New Orleans Bank,* 379 U.S. 411 (1965). Other cases on the same subject are *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907); *United States* v. *Ruzicka,* 329 U.S. 287 (1946) and *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507 (1953). The Fifth Circuit recognized and applied the rule in *Simpson* v. *Southwestern R.R. Co.,* 231 F.2d 59 (5th Cir. 1956). That Southern was fully aware of its right to a judicial review by a three-judge court is demonstrated by its participation in the action filed October 15, 1963, in the Middle District of Georgia, Macon Division, Civil No. 1939, in which interim relief was requested, as was the convening of a specially constituted three-judge district court. In that action, the validity of the Service Order was attacked, on the ground that no emergency existed, which justified the exercise of the Commission's emergency powers. The carriers later dismissed that action without prejudice.

The legislation before us requires one who would challenge the validity of an order, to first seek administrative relief from Division 3 as the appellate division of the Commission. An application for such relief would automatically stay the effect of the order until the issue was administratively decided by the appellate division.[18] This procedure could have been followed by Southern and each order, and its amendments, challenged at the administrative level. For that matter, such an application is required before the judicial review section of the legislation be-

[18] 14 U.S.C. § 17 (8).

comes effective. *Lambert Co.* v. *Baltimore & Ohio Ry. Co.*, 258 U.S. 377 (1922); *Simpson* v. *South Western R.R. Co.*, *supra*. The trial judge was of the belief that this line of cases, including *Interstate Commerce Comm'n* v. *Consolidated Freightways*, 41 F. Supp. 651 (D. N.D. 1941) was not controlling. We disagree.

A substantial number of the authorities cited by Southern throw little, if any, light on the issue here presented. A typical example is *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). The decision called for a construction of 28 U.S.C. § 2282, rather than § 2325. The restrictive language of the former, simply provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution of an Act of Congress, should not be granted by any district court or judge unless application therefor is heard and determined by a three-judge court. The statute there in question was entirely separate and distinct from any administrative procedure. This legislation is a far cry from the all inclusive language of 49 U.S.C. § 17 (9), requiring that "a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise.*" (Emphasis supplied). *Flemming* v. *Nestor*, 363 U.S. 603 (1960), likewise construing § 2282, is no better authority than *Kennedy*. We are not here concerned with the criminal prosecution, such as was involved in *Yakus* v. *United States*, 321 U.S. 414 (1944), but that decision is in full support of appellant's views. More to the point is *United States* v. *Ruzicka*, 329 U.S. 287 (1946), a proceeding by the United States under § 8a (6) of the Agricultural Marketing Agreement Act to enforce an order issued by the Secretary of Agriculture, requiring handlers of milk to pay money into a producer-settlement fund. To be observed is the similarity between an action to require the

payment of money into a fund in *Ruzicka* and this action to require the payment of penalties. Defendants there attempted to go behind the order of the Secretary requiring the payment of the money into the fund and show that the requirement was based on a faulty inspection of accounts and improper tests. Defendants claimed the right to assert this defense in the enforcement proceeding. *Stark* v. *Wickard*, 321 U.S. 288 (1944), was reconciled by showing that Congress had provided no administrative remedy for a producer to review the legality of an order against him, while Congress had so provided by § 8c (15) of the Agricultural Marketing Agreement Act. Attention was there directed to the many enactments of Congress in regulating economic enterprise in which the duty of enforcement was divided between the courts and the administrative agencies, and that the Congress distributed this responsibility in a variety of manners. Likewise, attention was directed to the fact that the Congress had utilized both the courts and administrative bodies for law enforcement purposes and that the enforcement procedure of the courts and the administrative agencies are collaborative instrumentalities of justice and not rivals. There, the court held, despite an absence of an explicit provision to that effect, that the review procedure provided for in the Act was the exclusive means of challenging the order and in so holding emphasized that the legislative intent was the controlling factor. Again, we point to the language of the legislation before us providing for first, administrative review, and, second, judicial review before a three-judge court "but not otherwise." "Otherwise" has a well defined meaning.[19] *Clinton* v. *United States*, 260 F.2d 824, 825 (9th Cir. 1958).

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[19] Otherwise. 1. In a different manner; in another way or in other ways; contrarily; . . . 2. In different circumstances; under other, or any other, conditions; . . . 3. In other respects; . . . Webster's International Dictionary, 2d Ed.

II.

Entirely aside from the jurisdictional barrier created by Southern's failure to follow the appellate procedure outlined in 49 U.S.C. § 17 (9), the record fails, under proper legal standards to support the lower court's conclusion that the second revised Service Order No. 939 was invalid because, (1) there was no evidence to support its finding of an emergency, and (2) the order was too vague to be enforceable.

Assuming the correctness of Southern's position that it is merely resisting enforcement of administrative action and, thus, entitled to challenge the validity of the revised order, nevertheless, the trial in the district court would not be *de novo*. *Motor Freight Express* v. *United States,* 119 F. Supp. 298, 303 (M.D. Pa. 1954) (three-judge court), *aff'd* 348 U.S. 891 (1954); *Lang Transportation Corp.* v. *United States,* 75 F. Supp. 915, 922 (S.D. Cal. 1948) (three-judge court). Furthermore, the only questions which could be properly raised would be those affecting the constitutional power, statutory authority and warrant in the record for the Commission's determination, ascribing to the Commission's finding the weight due to judgments of an expert body. *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 139-140 (1939). Consequently, the scope of judicial review of the Commission's order would necessarily be extremely narrow. The trial court properly ruled that emergency proceedings can only be invoked to deal with actual emergency circumstances. He then went on to state the box car shortage had been existent over a number of years and that there was no finding of an emergency shortage of 50-foot box cars or wide door 40-foot box cars at the time of the violations alleged in the complaint. He then held there was no actual emergency within the meaning of the legislation when the Second Revised Service Order was promulgated on February 6, 1963. We are here concerned with whether an emergency existed

at the time of the issuance of the Second Revised Order, with an expiration date of April 30, 1963, later amended to expire on December 31st of that year. The revised order stated in its preface, (1) that an acute shortage of box cars 50-foot long or longer and box cars 40-foot long or longer, with side openings, 8-foot wide or more existed, and (2) that the then present carrier rules and regulations respecting the use, supply, control, movement, distribution, exchange, interchange and return of box cars of the specified dimensions to the railroad owning them were ineffective to cope with the situation, and (3) that notice and public procedure were impracticable and contrary to the public interest and that good cause existed for making the order effective on less than 30 days notice. While it is true that the Board did not state the facts which formed the basis on which the recitations were grounded, there is nothing in the legislations[20] which requires such a statement. The only test for the exercise of this power, as outlined by Congress, was the "opinion" of "the Commission" as to the existence, at the time, of the type of an emergency contemplated by the statute. An emergency consists of a combination of circumstances which calls for immediate action. A three-judge court in *Daugherty Lumber Co.* v. *United States,* 141 F. Supp. 576, 580-581 (D. Or. 1956), in discussing the issuance by the Commission of a car service order, analyzes the difference between an "emergency" when viewed in a legislative sense and the same word when viewed from the commonplace meaning of an unforeseen combination

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[20] "Whenever the Commission is of the opinion that a shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have and is hereby given, authority either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing or other making or filing of a report, according as the Commission may determine. . . ."

of circumstances which calls for immediate action.[21] Consequently, the fact that the car shortage may have been of long standing, gives no support to a finding that an emergency did not exist. Of particular interest is the fact that *Daugherty* involved a challenge to a service order of the Commission somewhat similar in language to the order here under attack.

The only record of the Commission which was before the district court was the service order itself, containing the Board's summary findings, the expression of its opinion as to the existence of the emergency and the order based thereon. It is an established rule that the findings of the Commission may not be challenged on review in the absence of evidence upon which they were made and a complainant may not free itself of this restriction by attempting to introduce additional evidence on the hearing. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286 (1934); *Spiller* v. *A.T.&S.F. Ry. Co.;* 253 U.S. 117, 125 (1920). Furthermore, the appellant properly invokes the presumption that the Commission properly performed its official function and this presumption gives complete validity to its declaration of an emergency, in the absence of clear evidence to the contrary. *B.&O. Ry. Co.* v. *United States,* 298 U.S. 349, 358-359 (1936). Aside from the above, it is manifest the Congress intended that the opinion of the Commission be controlling in the absence of proof that the opinion was motivated by fraud, wrong-doing or capriciousness. *Daugherty Lumber Co.* v. *United States, supra.* The District Court's holding that an emergency could not exist over an extended period of time does not follow the law on the subject. *Daugherty Lumber Co.* v.

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[21] "Legislative emergencies are those situations where the common good or public interest is legislatively declared to be paramount to individual interest. Common knowledge tells us that legislative action effective immediately, has on legion occasions been adopted to correct an adverse public interest situation of long standing." *Daugherty Lumber Co.* v. *United States, supra, p. 581.*

United States, supra; Iversen v. *United States,* 63 F. Supp. 1001 (D. D.C. 1946) (three-judge court), *aff'd* 327 U.S. 767 (1946). A judge is not permitted to exchange his judgment for that of the Commission.

Since the record supports the Commission's finding that an emergency existed, it makes it unnecessary for us to discuss the absence of notice or a hearing before the promulgation of the order. The cases cited by Southern, other than *United States* v. *Southern Ry. Co.,* Civil Action No. 4723 (S.C. Greenville Division), appeal now pending, C.A. 4, No. 10796, do not support its theory on the existence of an emergency. *In Re Solar Mfg. Corp.,* 176 F.2d 493 (3d Cir. 1949) dealt with an emergency on the sale of assets under a court order under the Bankruptcy Act, while *Avent* v. *United States,* 266 U.S. 127 (1924) tends to anchor the theory of appellant, rather than that of Southern. Nor does *Peoria & P. Union Ry.* v. *United States,* 263 U.S. 528 (1924) lend support to Southern. That decision is confined to a declaration that the emergency powers conferred by Congress on the Commission did not include power to require a terminal carrier to switch by its own engines and over its own tracks freight cars which were tendered by and for another connecting carrier. We have no quarrel with the statement in *Chastleton Corp., et al.,* v. *Sinclair, et al.,* 264 U.S. 543, 547 (1924), that a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. No doubt, the Commission had authority to grant a hearing on such a contention at any time during the existence of the order, and we find nothing in Southern's pleadings which would indicate such a change after the effective date of the order under scrutiny and the terminal date of the penalties sought to be enforced.

The lower court felt that the order was too vague for enforcement.

We agree with the lower court that a statute "which either forbids or requires the doing of an act in terms so

vague that men of common intelligence must necessarily guess at it meaning and differ as to its application, violates the essentials of due process." He felt that the phrase, "used only for loading" in paragraphs (b) (3)[22] and (4)[23] was so ambiguous and vague that men of common intelligence could differ as to its meaning and application. In explaining his position, he stated, "On the one hand the phrase may be interpreted to mean that the order applies only to shippers, not to carriers (because shippers do the loading), and that even if it does apply to carriers it does not apply to the carrier's act of placing cars for loading or transportation. On the other hand, it not only may be, but is contended that the order applies to carriers and that it applies to their placing cars for loading and transportation."

The language of the order does not support these views. We must keep in mind that Southern, being a common carrier, was familiar with the language used in the field of interstate commerce. The order directed "each common carrier by railroad, subject to the Interstate Commerce Act . . . (2) observe, enforce, and obey [these] rules, regulations and practices with respect to its car service." Southern does not question the fact that the order was intended as a substitute for the then existing, but ineffective carrier rules, regulations and practices with respect to the use, supply, control, movement, distribution, exchange, interchange and return of box cars to the railroads using them, which rules contain precisely the same phrases. Southern, being a party responsible for the promulgation of the carrier's own rules, would be presumed to be familiar with their requirements. There can be no question but that the order covered the transportation of loaded cars and the act of placing cars for loading by the carriers. True enough,

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[22] "(b) (3) Cars locating in a home district may be used only for loading to a destination on or via owner's rails or to a junction with the owner."

[23] "(b) (4) Cars locating in a district adjacent to a home district may be used only for loading to a home district or beyond if routed via the owner."

a shipper may do the actual loading, but it is the duty of the carrier to distribute the cars for loading. The word "loading" is a technical word in the railroad field meaning both the loading of a car, that is the placing of freight in a car, and the transportation of the loaded car. The Association of American Railroads, the agent of Southern and other major lines, in its Code of Car Service Rules—Freight, uses the words "loaded" and "loading" in the following context:

> "Foreign empty cars other than those covered in Rule 2, shall be:
>
> (a) *Loaded* to or via owner's rails.
>
> (b) Loaded to a destination close to owner's rails than is the *loading* station or delivered empty to a short line or switch *loading* road for such *loading.*"

Patently, this rule, authored by Southern's Association, would be without meaning if the word "loaded" or "loading" was restricted to the placing of freight in a box car. Without question, the meaning of the word "load", as understood by the authors of the Code of Car Service Rules, was the meaning intended to be applied to the railroad's own Special Order No. 103. From the viewpoint of the Association, there was nothing vague or ambiguous in using the phrase in the manner so employed. The fact that Southern by letter to the Interstate Commerce Commission dated July 5, 1962, stressed the importance of full compliance with the Revised Service Order and indicated an intention to fully comply, if the Commission would force other railways to take the same steps, completely destroys Southern's contention that the challenged phrase was so vague that it could not be understood and is, therefore, void.

The judgment of the lower court is set aside and the cause remanded with directions to allow apellant's motion for a partial summary judgment on the issues herein decided and for such further proceedings as may be proper under the issues raised by the pleadings.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22588

D. C. Docket No. 1901—Civil Action

UNITED STATES OF AMERICA, *Appellant,*

v.

SOUTHERN RAILWAY COMPANY, *Appellee.*

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE; Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, set aside and the cause remanded with directions to allow appellant's motion for a partial summary judgment on the issues herein decided and for such further proceedings as may be proper under the issues raised by the pleadings.

July 27, 1966

Issued as Mandate:

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* Of Portland, Oregon, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,588

UNITED STATES OF AMERICA, *Appellant,*

v.

SOUTHERN RAILWAY COMPANY, *Appellee.*

Appeal from the United States District Court
for the Middle District of Georgia, Macon Division

(September 22, 1966)

On Petition for Rehearing

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and KILKENNY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby, denied.

* Of the District of Oregon, sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1074

SOUTHERN RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a–28a) is reported at 364 F. 2d 86. The opinion of the district court (Pet. App. 1a–11a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on July 27, 1966. A petition for rehearing was denied on September 22, 1966 (Pet. App. 30a). On December 4, 1966, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including February 18, 1967. The petition was filed on February 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 1(15) and 17(9) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(15) and 17(9), and 28 U.S.C. 2321–2325, are set forth in the Appendix, *infra*, pp. 15–18.

QUESTIONS PRESENTED

1. Whether a one-judge district court exceeded its jurisdiction in holding an Interstate Commerce Commission car-service order invalid in a suit for civil penalties brought against a railroad for violation of its terms, when the railroad invoked neither the administrative nor judicial remedies prescribed for testing the order's validity.

2. If not, whether the Commission had authority to promulgate the order without notice or hearing, under the emergency provisions of Section 1(15) of the Interstate Commerce Act.

STATEMENT

As evident to even a casual observer of a passing freight train, boxcars are interchanged freely among the nation's railroads. Congress having ordained "continuous [carriage] from the place of shipment to the place of destination" without change of lading, 49 U.S.C. 7, we have, in effect, a nationwide pool of railroad boxcars. See, also, 49 U.S.C. 1(4). The construction and repair of cars remains within the managerial discretion of each railroad. Accordingly, what contribution each railroad makes to this pool of boxcars is a matter for its determination, subject only to the statutory obligation "to provide and fur-

nish transportation upon reasonable request therefor" (49 U.S.C. 1(4)). A railroad can discharge that obligation by furnishing to its shippers either cars that it owns, or cars of another railroad for the use of which it must make appropriate per diem payments ("foreign" cars).

Maintaining an overall view of the distribution and handling of cars is the Car Service Division of the Association of American Railroads, pursuant to an agreement to which most of the nation's railroads, including petitioner, have subscribed. Under its auspices the railroads promulgated car-service rules setting forth certain broad principles for the handling and distribution of cars, *Official Railway Equipment Register,* I.C.C.–R.E.R., No. 34, pp. 1140–1143, but their rules failed either to stem the decline in the numbers of railroad cars or to achieve complete carrier compliance, at the very time that the need for efficient utilization of the car fleet was becoming most pressing. *Car Service, Freight Cars,* 268 I.C.C. 687, 691.

By 1962 concern was acute that the railroads were not replenishing the supply of cars as rapidly as they were retiring them. A study made for the Senate Commerce Committee reported:

> Freight car ownership is declining. We believe it unrealistic to compare present requirements with the all-time high ownership of 2,427,026 cars in 1926. However, since 1955 ownership has declined from 1,736,866 cars to 1,723,200 in 1959, a net loss of 13,666 cars. [S. Rep. No. 445, 87th Cong., 1st Sess., p. 721.]

In its 1962 annual report, the Commission, as it had in its annual reports for the several preceding years, called attention to the declining number of railroad cars, noting, "Serviceable freight car ownership continued its downward trend (1,540,719, June 1, 1961—1,513,318, June 1, 1962) as a result of curtailed expenditures on the part of the railroads." Interstate Commerce Commission, 76th Annual Report 91 (1962). This trend resulted in serious shortages in specific areas, for the transportation of specific commodities, or with respect to specific types of rolling stock.

Early in 1962 an acute shortage developed in the supply of plain 40-foot boxcars with doors eight feet wide and wider and plain 50-foot boxcars, used primarily in the transportation of lumber. The Car Service Division (see p. 3, *supra*) responded by issuing, on March 19, 1962, Special Car Order No. 103, which, in essence, imposed, as an express requirement with respect to the cars in short supply, the general principle long embodied in the Division's car-service rules (see *Car Service, Freight Cars, supra,* 268 I.C.C. 704–705)—that foreign cars be loaded via a route in which the owning road would participate, or loaded in the direction of the home road, or delivered empty to the road from which originally received, or returned empty.

The Division's order lacked means of enforcement; numerous violations of its provisions occurred; and the acute shortage in 40-foot and 50-foot boxcars persisted. Interstate Commerce Commission, 76th Annual Report 105 (1962). Accordingly, on May 21, 1962, the Commission's Safety and Service Board

No. 1 (which handles car-service matters) held a meeting and, pursuant to the procedure of Section 1(15) of the Interstate Commerce Act, 49 U.S.C. 1(15) (App., *infra*, pp. 15–16), decided that the acute shortage of boxcars, together with the ineffectiveness of the carriers' rules and regulations dealing with the problem, had resulted in an emergency; declared such an emergency; and determined that immediate action was required in all parts of the country and that notice and public procedure were impracticable. It then issued Service Order No. 939, effective May 27, 1962, with an expiration date of December 31, 1962 (later extended when complaints of acute shortages of boxcars continued to be made to the Commission). Essentially, the order was a restatement of the carriers' Special Car Order No. 103 (Pet. App. 15a).

The problem worsened, and on February 5, 1963, the Board met, vacated Revised Order No. 939, and issued its Second Revised Service Order No. 939, which again declared that an emergency existed.[1]

[1] "It appearing, That an acute shortage of box cars, fifty-foot long or longer and box cars forty-foot long or longer with side door openings eight-foot wide or more; and it appearing, that the present carrier rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange and return of box cars of these dimensions to the railroads owning such cars are ineffective; the Commission is of the opinion that an emergency exists requiring immediate action in all parts of the country, and that notice and public procedure are impracticable and contrary to the public interest and that good cause exists for making this order effective upon less than thirty days' notice." (Pet. App. 16a–17a, n. 10.)

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This order, which is under attack in this action, became effective on February 6, 1963, with an expiration date of April 30, 1963. The substance of the order was essentially the same as the previous order (Pet. App. 16a–17a).

Petitioner was one of the railroads which were experiencing grave difficulties in satisfying shippers' requirements for 40- and 50-foot boxcars. It owned some 6300 of the former and some 4400 of the latter, but for a year or so prior to the Commission's promulgation of Service Order No. 939, it had had an average of only 33 percent of its 40-foot boxcars, and only 24 percent of its 50-foot boxcars, on-line. Petitioner accordingly had much to gain from, and strongly favored, the prompt return of its rolling stock, but it questioned whether the Commission's car-service order was sufficient to achieve this objective. Nevertheless, petitioner at no time petitioned for reconsideration or submitted other pleadings to the Commission, as under the Commission's procedures it might have, but expressed its misgivings about the car-service order exclusively in correspondence that its president exchanged with the Chairman of the Commission.[2]

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[2] On November 6, 1962, President Brosnan wrote Chairman Murphy that Service Order No. 939 had proved ineffectual for the petitioner and "should either be cancelled immediately or enforced in such way as to insure Southern the use of its equipment for loading by its shippers." Chairman Murphy replied, and on December 4, 1962, President Brosnan responded that he was "glad to see that the Commission is taking active steps to see that its order is obeyed." On July 10, 1963, President Brosnan wrote Chairman Walrath that, notwithstanding the order, "unwarranted use of our cars by other railroads continues." Chairman Walrath replied, and on July 29, 1963,

A few days after its last letter, petitioner brought an action in the United States District Court for the Middle District of Georgia (*Georgia Southern and Florida Ry. Co., et al.* v. *United States,* Civil Action No. 1939) asking that a three-judge court be convened pursuant to 28 U.S.C. 2284, 2321–2325, and that it set aside Service Order No. 939. As grounds, petitioner, among other things, alleged for the first time that the procedures of Section 1(15) of the Act had been improperly invoked in the issuance of the order and that the terms of the order were vague, indefinite and uncertain. The United States and the Commission answered. Subsequently, on June 2, 1964, with the consent of the defendants and by order of the three-judge court, petitioner withdrew its suit, the complaint being dismissed without prejudice.

In the meantime, on May 31, 1963, an action for civil penalties had been brought against petitioner for 15 violations of Service Order No. 939.[3] The trial was held in abeyance while the three-judge court review of the service order remained pending. In the penalty action, petitioner did not deny that it had violated the car-service order, but defended its conduct on the

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President Brosnan responded, "If you cannot police [the order] so as to accomplish the intended purpose of compelling the return of cars to the owners' lines, you should discontinue it." On September 7 and 30, 1963, President Brosnan further wrote Chairman Walrath of his disappointment with Service Order No. 939, concluding that "it is apparent that the Commission is unwilling to withdraw this order; consequently, as much as I dislike to do so, we must take our case elsewhere, either to the Congress or the courts or both."

[3] This was one of 23 actions brought alleging railroad violations of the car-service order.

grounds, among others, that the procedures of Section 1(15) of the Act had been improperly invoked in the issuance of the order and that the order was vague, indefinite and uncertain.

The United States moved for summary judgment, urging that it was beyond the power of the one-judge district court to hold the car-service order invalid by way of defense to a suit for civil penalties brought against a railroad for violating its terms, when the railroad had invoked neither the administrative nor the judicial remedies prescribed for such a challenge. The district court disagreed, and went on to hold that the car-service order was invalid in declaring the existence of an emergency and also that it was too vague to be enforceable.

The court of appeals reversed. It held that, under the express statutory scheme for administrative and judicial review of Commission orders in 49 U.S.C. 17(9), the district court did not have jurisdiction to entertain petitioner's collateral attack upon the validity of the Commission's car-service order, and that, quite apart from this jurisdictional barrier, the defense of a lack of emergency and vagueness in the order was without merit.

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict among circuits.[4] Further review is not warranted.

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[4] The same questions decided by the Fifth Circuit here and argued in the present petition are now pending before the Fourth Circuit in *United States* v. *Southern Railway Co.*, No. 10,769, a substantially identical case, which was argued on

1. Petitioner, in first challenging the car-service order by way of defense to a penalty action for its violation, both failed to exhaust its administrative remedies and improperly attempted to circumvent the statutory provisions for judicial review of Commission orders. On either ground, its attack on the validity of the order must fail.

a. The Interstate Commerce Act provides for rehearing, reargument or reconsideration of any decision, order or requirement of the Commission, or of a division of the Commission, an individual commissioner, or—as here—a board (49 U.S.C. 16(6), 17(6) and 17(7)); "after" exhaustion of these administrative remedies the order may be challenged judicially in a suit to enjoin, suspend, or set it aside—"but not otherwise" (49 U.S.C. 17(9)). Petitioner made no attempt, under the Commission's procedures, administratively to challenge the board's order, though it could have asked the full Commission to review it. In asking the courts to set the order aside notwithstanding its default petitioner violated a cardinal precept of administrative law—that a party seeking judicial relief from agency action must first exhaust its administrative remedies. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291.

January 12, 1967. The district court in that case (*United States* v. *Southern Railway Co.*, 250 F. Supp. 759 (D.S.C.), followed the district court decision in the present case; this was, of course, before it was reversed by the Fifth Circuit.

b. Beyond that, Section 17(9) grants power to invalidate Commission orders (save reparation or other money orders) only to three-judge district courts—not to a one-judge court in a penalty action. The procedure is in terms exclusive, and must, therefore, be followed. See *e.g., Lambert Co.* v. *Baltimore & Ohio R.R. Co.,* 258 U.S. 377; *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507; *Powell* v. *United States,* 300 U.S. 276; *Venner* v. *Mich. Cent. R.R. Co.,* 271 U.S. 127, 130; *North Dakota* v. *Chicago & N.W. Ry. Co.,* 257 U.S. 485; *Meyers* v. *Famous Realty, Inc.,* 271 F. 2d 811, 817, certiorari denied, 362 U.S. 910; *United States* v. *Railway Exp. Agency,* 101 F. Supp. 1008, 1012 (D. Del.); *Interstate Commerce Commission* v. *Consolidated Freightways,* 41 F. Supp. 651 (D. N.D.); *Village of Mantorville* v. *Chicago Great Western R. Co.,* 8 F. Supp. 791, 795–796 (D. Minn.); cf. *Whitney Bank* v. *New Orleans Bank,* 379 U.S. 411; *United States* v. *Ruzicka,* 329 U.S. 287, 292; *Yakus* v. *United States,* 321 U.S. 414; *United States* v. *Sykes,* 310 F. 2d 417 (C.A. 5); *La Verne Co-op. Citrus Ass'n* v. *United States,* 143 F. 2d 415 (C.A. 9).

Petitioner's reliance upon *United States* v. *P. Koenig Coal Co.,* 270 U.S. 512, and *United States* v. *Michigan Portland Cement Co.,* 270 U.S. 521 (Pet. 14, 16), is misplaced. Both were criminal actions (in the same district court) charging violations of Section 1 of the Elkins Act. In *Koenig* the defendant did not rely upon the alleged invalidity of the Commission's order and the Court did not pass upon any such issue. See 270 U.S. at 517. In *Michigan Port-*

land Cement, the raising of the invalidity of the Commission's order as a defense was not challenged. In neither case was the challenged order held invalid, and in any event both cases were decided prior to the passage of 49 U.S.C. 17(9) in 1940.[5]

Petitioner also errs in relying upon *Flemming* v. *Nestor,* 363 U.S. 603; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; and *Garment Workers* v. *Donnelly Co.,* 304 U.S. 243. Those decisions involved the construction of 28 U.S.C. 2282 rather than Sections 2321–2325, and, as the court below pointed out (Pet. App. 21a), did not arise in the context of a statutory scheme for administrative and judicial review of a regulatory agency's order.

2. While, for the foregoing reasons, we believe that the validity of the car-service order may not be challenged in this proceeding, we also believe that the court of appeals correctly held the order valid.

Petitioner takes the position that because the decline in the supply of cars was a continuing problem,[6]

[5] Four district court cases cited by petitioner on page 15 of the petition are no more in point, since none was concerned with an attack upon the validity of a Commission order as a defense in a penalty suit, and in none did the court attempt to hold a Commission order invalid. As to *United States* v. *Thompson,* 58 F. Supp. 213 (E.D. Mo.), it does not appear that either party raised, or the court considered, the question whether the order could properly be attacked collaterally; nor does it appear that the decision has been followed by any court in the more than twenty years since it was rendered. The *Thompson* rationale was specifically rejected by a three-judge court in *Burton* v. *United States,* 7 Fed. Car. Cases ¶ 80,565 (W.D. Va.), affirmed *per curiam,* 338 U.S. 946.

[6] The long-range car supply problems are receiving the attention of the Commission in the proceedings in *Ex Parte* No. 241,

an acute shortage of specified types of boxcars affecting all parts of the country, as dealt with in Service Order No. 939, could not constitute an "emergency" warranting the use of the Commission's special powers under Section 1(15). The statute affords no support to so restrictive a reading. *Daugherty Lumber Co.* v. *United States,* 141 F. Supp. 576, 580–581 (D. Ore.); H. Rep. No. 18, 65th Cong., 1st Sess., pp. 3–6.[7] The only statutory condition for the exercise of the Commission's powers under Section 1(15) is the existence of an emergency in the "opinion" of "the Commission" (*Iversen* v. *United States,* 63 F. Supp. 1001, 1003 (D. D.C.), affirmed *per curiam,* 327 U.S. 767). In the present case, the Commission set forth its findings in the service order with respect to "an acute shortage of box cars", the existence in its opinion of an emergency requiring immediate action in all parts of the country, and the impracticability and detriment to the public interest of

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Investigation of Adequacy of Railroad Freight Car Ownership, and *Ex Parte* No. 252, *Incentive Per Diem Charges,* now being heard by examiners of the Commission.

[7] The author of the car-service bill stated (55 Cong. Rec. 2020):

> Mr. ESCH: * * *
>
> The matter of car shortage is not of recent development. It has been with us for many years. It is an evil that is seasonal for the most part, occurring in those periods of the year when the shipments of coal and grain are greatest. The car shortage that has been existing ever since March of last year, which has been continuous in fact for a year, may in large degree be attributed to war conditions. While this bill seeks to give added powers to the commission in cases of emergency, it is not merely the emergency of war but the emergency of economic conditions.

notice and public procedure. The court was not entitled to substitute its judgment on these points for that of the Commission. *Avent* v. *United States*, 266 U.S. 127; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286; *Daugherty Lumber Co.* v. *United States, supra*, 141 F. Supp. at 581.

Petitioner also argues that the Commission can issue only "directions" under its emergency powers, which it interprets to mean an action which will resolve only a very limited local problem, akin to a traffic jam, and that it cannot issue an order applicable to all railroads in all parts of the country (Pet. 12–13). But the statute provides expressly that the Commission has authority "to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission," and also "to make such just and reasonable directions with respect to car services * * * as in its opinion will best promote the service in the interest of the public and the commerce of the people * * *" (49 U.S.C. 1(15)). If the Commission may thus suspend *all* rules and regulations respecting car service, surely it may issue directions to accomplish whatever is necessary to relieve the situation. There is nothing in the wording of the statute, nor do we find anything in the legislative history,[8] which would prevent the Commission from

[8] Whatever limitations the Commission may originally have conceived upon the powers which it should be given to deal with car-service problems (See Pet. 13), the fact is that the summary power actually given the Commission to deal with such problems is not, and was not intended to be, restricted to circumscribed, localized difficulties.

dealing with any facet of car service or applying its orders to all railroads in all parts of the country as it found necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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KATHRYN H. BALDWIN,
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APRIL 1967.

APPENDIX

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*, provides in part as follows:

49 U.S.C. 1(15):

(15) *Powers of Commission in case of emergency.*

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission: (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks

for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

49 U.S.C. 17(9):

(9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.*

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Title 28 of the United States Code provides in pertinent part as follows:

SEC. 2321:

Procedure generally; process.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

SEC. 2322:

United States as party.

All actions specified in section 2321 of this title shall be brought by or against the United States.

SEC. 2323:

Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sec-

tions may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

SEC. 2324:

Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

SEC. 2325:

Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

U.S. GOVERNMENT PRINTING OFFICE: 1967